

# **Exhibit A**

F5Q8ARIC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 ARISTA RECORDS LLC, et al.,

4 Plaintiffs,

5 v. 15 Cv. 3701 (AJN)

6 VITA TKACH, et al.

7 Defendants.

8 -----x

9 May 26, 2015  
10 12:00 p.m.

11 Before:

12 HON. ALISON J. NATHAN

13 District Judge

14 APPEARANCES

15 JENNER & BLOCK LLP  
16 Attorneys for Plaintiffs  
BY: KENNETH L. DOROSHOW  
GIANNI P. SERVODIDIO

17 GOODWIN PROCTER  
18 Attorneys for Defendant  
BY: WILLIAM J. HARRINGTON

19

20 Also present: (by telephone)

21 KENNETH CARTER, CloudFlare, Inc.  
MITCHELL STOLTZ, Electronic Frontier Foundation  
22 CORYNNE McSHERRY, Electronic Frontier Foundation

23

24

25

SOUTHERN DISTRICT REPORTERS, P.C.

F5Q8ARIC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SOUTHERN DISTRICT REPORTERS, P.C.

F5Q8ARIC

1 (Case called)

2 THE DEPUTY CLERK: Parties, please state your name for  
3 the record starting with the plaintiff.

4 MR. DOROSHOW: Good morning, your Honor. Kenneth  
5 Doroshow for the plaintiffs.

6 THE COURT: Good morning, Mr. Doroshow.

7 MR. SERVODIDIO: Gianni Servodidio for the plaintiffs.

8 THE COURT: Good morning, Mr. Servodidio.

9 For the defendant, present in the courtroom, for  
10 CloudFlare.

11 MR. HARRINGTON: Bill Harrington.

12 I can tell the Court that telephonically are my  
13 co-counsel Mitchell Stoltz and Corynne McSherry for Electronic  
14 Frontier Foundation, and counsel for CloudFlare, Kenneth  
15 Carter.

16 THE COURT: The folks on the phone, we have got Mr.  
17 Carter, Mr. Stoltz and Ms. McSherry. Are you able to hear me?

18 COUNSEL IN UNISON: Yes, your Honor.

19 THE COURT: The acoustics for joining a hearing by  
20 phone are not good, I am afraid, but I am happy to have you  
21 listen in. I suspect you won't have difficulty hearing me.  
22 You may have difficulty hearing counsel. I have got the  
23 speaker pointed at the phone the best I can. I will ask  
24 counsel to please speak directly into the microphone and keep  
25 your voices up. We do have a court reporter. So to the extent

F5Q8ARIC

1 that you miss anything, I urge you to order the transcript to  
2 cover it.

3 With those introductions, we are here on plaintiffs'  
4 application for a supplemental order and order to show cause  
5 requiring third-party CloudFlare, Inc. to comply with the  
6 pending temporary restraining order.

7 Just to get the procedural posture clarified, I will  
8 indicate I am on Part 1 duty so I have had TROs coming out of  
9 my eyeballs, and so I have not, though this came in on the  
10 Friday before the long weekend, and I just moments before  
11 coming on the bench was handed a copy of CloudFlare's  
12 opposition letter, needless to say, this is new to me, and so  
13 we will figure out what we need to do today, what we might need  
14 to do over a longer period of time, but let's just get the  
15 procedural posture squared away.

16 This case, which is 15 Civ. 3701, came in a few weeks  
17 ago as a related case to a case in front of me. Because it had  
18 not yet been assigned a judge when it came in, the temporary  
19 restraining order request that came with the complaint went to  
20 the then Part 1 judge, Judge Batts. She granted the TRO, which  
21 I have in front of me, and I am sure there is a docket number  
22 for it, but I don't have it in front of me. It should have  
23 been docketed. The case was filed under seal. I have, I  
24 believe, unsealed the case, seeking verification from my clerk.  
25 Yes. In any event, Judge Batts granted this TRO against the

F5Q8ARIC

1 defendants, and that was on -- was that May 13, counsel?

2 MR. SERVODIDIO: Yes, your Honor.

3 THE COURT: -- May 13, 2015 against the defendants. I  
4 think for present purposes, it contains a provision -- we will  
5 get to the argument for application to the third party here.

6 Who should I hear from on behalf of the plaintiffs,  
7 Mr. Doroshow?

8 MR. DOROSHOW: Yes, your Honor.

9 THE COURT: So, you then did what with the TRO with  
10 respect to CloudFlare?

11 MR. DOROSHOW: Before we got to CloudFlare, the TRO  
12 spoke specifically to the domain name registrar through which  
13 the defendants had registered their then current domain names,  
14 and that was a company called Namecheap. So we went  
15 immediately to Namecheap with the TRO, which required them to  
16 take certain action with respect to the domain name, to  
17 effectively render it inaccessible, which they did. We also  
18 immediately served it on defendants who have since openly filed  
19 the order.

20 The very next day the defendants changed their domain  
21 name to yet another iteration of a Grooveshark domain from what  
22 was grooveshark.io and grooveshark.pw to a domain called  
23 grooveshark.vc. So we then went to the domain registrar who  
24 administers that domain, and they too complied, the effect of  
25 which was to render that domain inaccessible.

F5Q8ARIC

1           At the same time we went to that particular domain  
2 registrar, we went to CloudFlare with a copy of the order.

3           THE COURT: When was that?

4           MR. DOROSHOW: That was on the 14th of May, the day  
5 after the TRO issued.

6           THE COURT: Go ahead.

7           MR. DOROSHOW: Then CloudFlare's in-house counsel  
8 responded, invited a telephone conversation, which we had on  
9 the 15th. The sum and substance of that conversation was that  
10 CloudFlare did not believe the order applied to them, and that  
11 if we wanted them to take any action with respect to this  
12 particular Web site, that we would have to seek an order from  
13 your Honor to do so, which is where we are now.

14           THE COURT: Then Mr. Servodidio was here on Friday,  
15 which was May 22, with the papers seeking this supplemental  
16 order. I briefly met with him just to indicate that there was  
17 no basis for proceeding ex parte. He indicated that in fact  
18 the papers had been served on CloudFlare. We set a 5:00 time  
19 for a potential remeeting for the plaintiff to be heard. I  
20 learned that that time was unavailable, I believe that time was  
21 unavailable for CloudFlare, so you worked out a time over the  
22 weekend, and that's why we are here now.

23           So I think procedurally that's as far as we got, until  
24 a short time ago, Mr. Harrington, you filed on behalf of  
25 CloudFlare an opposition paper.

F5Q8ARIC

1                   MR. HARRINGTON: Yes, your Honor. I apologize both to  
2 plaintiffs and the Court for submitting it so close to our  
3 12:00.

4                   The request that we have is that we have until Monday,  
5 June 1, to file briefing in connection with this. The purpose  
6 of the letter was to give the Court some of the reasons why we  
7 think that this is a serious issue and a challenging issue for  
8 CloudFlare, an important issue for servicers that operate in  
9 the Internet, and why an expansion of a TRO like this, two  
10 entities beyond an entity such as a domain registrar, poses  
11 serious problems, novel problems, and we would like adequate  
12 time to be able to brief it and fully develop arguments related  
13 to that.

14                  THE COURT: Well, I will hear from plaintiff on that.  
15 I think what we need to do, I am inclined certainly to give  
16 CloudFlare an opportunity to be more fully heard, and in any  
17 event, I need time to read what they have to say. I think a  
18 couple of procedural questions come to mind, and then maybe  
19 related, some factual questions.

20                  In the underlying case, we have a preliminary  
21 injunction hearing set for June 3rd. I believe that there has  
22 been no appearance or opposition by the actual defendants in  
23 that case. And plaintiffs' counsel are shaking their head yes.

24                  So, on the theory that that continues to be so,  
25 presumably we will be in something like a default judgment

F5Q8ARIC

1 posture and plaintiff will be seeking to have the TRO converted  
2 to a PI, or permanent injunction.

3 MR. DOROSHOW: That's correct.

4 THE COURT: Let me begin there and ask plaintiffs'  
5 counsel, has there been any indication that any of the named  
6 defendants in 15 Cv. 3701 are intending to participate?

7 MR. DOROSHOW: Quite to the contrary, your Honor. The  
8 people or persons who are responsible for this Web site have  
9 openly announced through media channels that they are in  
10 defiance of the order, and that we can't stop anything to stop  
11 them. So they are not going to appear, as far as we can tell.

12 THE COURT: OK. I suppose this is a factual question  
13 for both sides, depending on whether you agree or not.

14 What then now is happening with grooveshark.io, dot  
15 pw, dot vc, or dot anything else? In other words, what is out  
16 in the Internet world with respect to what you argue is the  
17 infringing site?

18 MR. DOROSHOW: Just to follow the timeline, as I  
19 indicated previously, after they had moved the Web site from  
20 grooveshark.io and grooveshark.pw to a new domain  
21 grooveshark.vc, we had proceeded with the registrar to  
22 effectively shut down grooveshark.vc. Immediately thereafter,  
23 the same defendants had registered for yet another domain name  
24 grooveshark.li, which happens to be the top-level domain for  
25 the nation of Liechtenstein, and it is administered in

F5Q8ARIC

1 Switzerland. So they are now operating as grooveshark.li.

2 Now, throughout the entire process, from the beginning  
3 of grooveshark.io all the way through to the present  
4 grooveshark.li, CloudFlare has been servicing this Web site,  
5 and that is why we are here to seek a remedy against  
6 CloudFlare.

7 THE COURT: We will get briefly to what it means for  
8 CloudFlare to service the Web site, and I have come to the  
9 awareness that there may be factual questions that implicate  
10 legal issues here, but this is just to get my head around the  
11 basics of the technology.

12 So, it's plaintiffs' position that as this sort of  
13 game of Whac-A-Mole continues, that wherever grooveshark dot  
14 whatever is next, assuming you can get LI shut down, the Web  
15 site itself, once it appears through a domain registrar, is  
16 serviced by CloudFlare, and I understand from the letter what  
17 that means I think.

18 Well, let me ask plaintiff first and then defendant  
19 very briefly what you understand that to mean and what would  
20 happen if CloudFlare did stop servicing.

21 MR. DOROSHOW: Sure.

22 You're correct that the Web site is up and running in  
23 whatever iteration. Today's iteration is grooveshark.li. It  
24 is growing in popularity. It is becoming more of a problem  
25 every day. The irreparable harm of which we complained at the

F5Q8ARIC

1 very beginning of this process only continues to worsen.

2           With respect to what CloudFlare is doing, I must say  
3           for the record we were handed a copy of the letter that  
4           CloudFlare provided to you, although with the caveat that it is  
5           not the same letter that your Honor has. We were handed an  
6           earlier version, so we have yet to see the version your Honor  
7           has. We have to reserve rights to whatever that letter  
8           contains. But having quickly reviewed, sitting here today, the  
9           letter, the version that was handed to us, there are some  
10          pretty fundamental inaccuracies in the letter. But even a  
11          basic point of agreement, there is a statement in the letter  
12          which says that among the services that CloudFlare provides is  
13          to ensure that Web surfers get the fastest page load times and  
14          best performance.

15           Among the services that CloudFlare provides to its Web  
16          site customers is optimization and speed. So it enhances the  
17          user experience. So through CloudFlare services, people are  
18          using this blatantly infringing Web site. Its mere existence  
19          is infringing and its express purpose is infringing. Users get  
20          an enhanced experience by virtue of CloudFlare services.  
21          That's at a baseline level.

22           More under the hood, the technical services that they  
23          provide include, without limitation, the name server resolution  
24          to the Web site. And what that means is, whenever a user  
25          enters a domain name into his or her browser, Amazon.com for

F5Q8ARIC

1 example, that domain name has to be resolved to an IP address,  
2 because computers only speak to each other in terms of  
3 numerical addresses. So there is this domain name system that  
4 will resolve the human readable name of, in this instance  
5 grooveshark.li, to a numerical IP address.

6 There are what are called authoritative name servers  
7 for every domain. And that authoritative name server has the  
8 definitive conversion information. In other words, there is an  
9 authoritative name server that is queried. Essentially, the  
10 computer asks that server, What is the IP address for  
11 grooveshark.li? It says it's this number, sends that number  
12 back to the computer, and the computer then accesses the Web  
13 site through the IP address.

14 CloudFlare is providing that name server  
15 functionality. In fact, the current name of the grooveshark.li  
16 name servers, and there are two, which typically it's done for  
17 redundancy purposes, one is called jim.ns.cloudflare and the  
18 other is called olga.ns.cloudflare, the NS standing for name  
19 server.

20 So CloudFlare is providing that name server domain a  
21 numerical address resolution. If they were to stop doing that,  
22 a query to the Web site for grooveshark.li would not return a  
23 response, and the user therefore could not access  
24 grooveshark.li through that domain name. And that's the remedy  
25 we are seeking from CloudFlare here.

F5Q8ARIC

1           THE COURT: So it follows then that the answer to the  
2 second question, if CloudFlare were to stop servicing  
3 grooveshark.li or whatever is next, that there would be no  
4 ability -- you tell me. What then?

5           MR. DOROSHOW: Then the operators would have to  
6 reconfigure their system in some way, and theoretically they  
7 could. But CloudFlare should not be permitted to provide not  
8 only the name server resolution, but the optimization services  
9 that it also provides that speed up the user experience.

10          THE COURT: So just to get my head around what is  
11 going to happen between now and when this is resolved or what  
12 is not going to happen between now and when this is resolved.

13          So, on the optimization or the enhancement, presumably  
14 grooveshark dot whatever continues to exist in the world and be  
15 accessible, but it will be a slow go for viewers as a result of  
16 the lack of servicing by CloudFlare. That's one thing that  
17 will happen or not happen.

18          MR. DOROSHOW: Correct.

19          THE COURT: I couldn't quite tell if the other thing  
20 that you're saying was happening is, not only will it not be an  
21 enhanced experience, there will be no experience.

22          MR. DOROSHOW: That's correct. In addition to the  
23 optimization services, if they stop providing the name server  
24 functionality, if they stopped providing these Jim and  
25 olga.ns.cloudflare name servers, a query for grooveshark.li

F5Q8ARIC

1 will return no result, and therefore a user will not be able to  
2 access the Web site on that basis.

3 THE COURT: How do people know about grooveshark.li or  
4 dot whatever else?

5 MR. DOROSHOW: In terms of just the general awareness  
6 of the site's existence?

7 THE COURT: Yes.

8 MR. DOROSHOW: Through the promotion that these  
9 anonymous operators using aliases, including shark, that's a  
10 common alias that this particular defendant is using, makes  
11 statements to the press and there tends to be a bit of a  
12 groundswell from there.

13 Basically, what the defendants are trying to do is to  
14 exploit the attention and gather eyeballs for their Web sites  
15 through word of mouth. And their open defiance of this Court's  
16 order is presumably regarded as a marketing tool.

17 THE COURT: So if that happens and there is a news  
18 article that says now they are grooveshark.li, and someone  
19 wants to go download music through grooveshark.li, does the  
20 name server functionality that you talked about that involves  
21 CloudFlare have anything to do with that or will they still be  
22 able to go to grooveshark.li?

23 MR. DOROSHOW: It has everything to do with it. That  
24 is what is happening today. The Web site is currently at  
25 grooveshark.li. The defendants have promoted it in that

F5Q8ARIC

1 fashion. So that's the current state of the universe. Any  
2 time a user wants to go to grooveshark.li by entering that  
3 address in their browser, there is this name server resolution  
4 that occurs on a CloudFlare server. Without that server and  
5 without functionality, a query --

6 THE COURT: You would get a blank page.

7 MR. DOROSHOW: Correct.

8 THE COURT: You said Lithuania, is that where  
9 grooveshark.li is?

10 MR. DOROSHOW: Liechtenstein.

11 THE COURT: So if that ends up shut down through  
12 whatever mechanism, and then the defendants move to grooveshark  
13 dot something else, so let's say it's grooveshark.co, and if  
14 someone then types in grooveshark.co, does their ability to  
15 access the Web site depend on whether CloudFlare is servicing  
16 them or not?

17 MR. DOROSHOW: It depends on whether there is a name  
18 server that is set up. If CloudFlare is providing that name  
19 server, then CloudFlare will be assisting in that transmission.  
20 If they go to some other party for a name server, then they  
21 would access it through that other party.

22 THE COURT: So the name server functionality is a  
23 necessary component of accessing what you view as the  
24 infringing Web sites. So right now that's being provided by  
25 CloudFlare. If it's not CloudFlare, it could either be another

F5Q8ARIC

1 service or presumably maybe the defendants could do it  
2 themselves in some way.

3 MR. DOROSHOW: Theoretically. It's typically an  
4 outsourced function to some third party, but yes.

5 THE COURT: So, the optimization and enhancement issue  
6 seems not to matter much. Either it's on or it's off, right?  
7 Either you have access or you don't. If you have access, then  
8 it's enhanced. If you don't have access, it's certainly  
9 unenhanced.

10 So let me give Mr. Harrington an opportunity to  
11 respond to any points they are raising. Again, the idea here  
12 is to help me get my head around the basic mechanics of what is  
13 going on. The goal here is to set a schedule of some kind and  
14 figure out what we need to do in terms of additional briefing,  
15 in terms potentially if there are factual issues, in resolving  
16 these and the like.

17 Mr. Harrington, with the goal toward helping me  
18 understand the basics, you have a different view as to what  
19 CloudFlare's role is here?

20 MR. HARRINGTON: Yes, your Honor. Our view is that if  
21 CloudFlare stops serving the customer, that customer may  
22 automatically continue being able to provide services or can  
23 very quickly and easily continue providing access to its  
24 content. So that enjoining CloudFlare from serving a  
25 particular customer will not achieve the end, or if it does, it

F5Q8ARIC

1 will be for a very brief period of time.

2 THE COURT: Because they would just hire somebody else  
3 to do it or what?

4 MR. HARRINGTON: We have a paragraph in our letter  
5 that describes it. It's at the top of page 2. What we say in  
6 the letter -- this is based on running the CloudFlare service  
7 against what engineers at CloudFlare tell us -- is that should  
8 CloudFlare cease to serve a customer, either traffic to the  
9 customer's Web site will automatically be routed to the  
10 customer's own servers rather than CloudFlare, just simply  
11 bypassing the CloudFlare network, or the customer will detect a  
12 loss of service and reconfigure its DNS throughout traffic  
13 directly to customer services or to an alternate content  
14 delivery network.

15 I think on this factual point, it's CloudFlare's view  
16 now that enjoining CloudFlare will not achieve the goals that  
17 plaintiffs seek.

18 THE COURT: I am just trying to reread that sentence.

19 One possibility is, if CloudFlare enables access to  
20 this allegedly infringing site, if what you're saying is if you  
21 stop CloudFlare from doing that someone else will do it,  
22 therefore don't stop CloudFlare from doing it, that doesn't get  
23 you very far, as I am sure you recognize.

24 MR. HARRINGTON: I don't think it's a kind of  
25 Whac-A-Mole problem you have with the DNS registries where they

F5Q8ARIC

1 are shut down and you can start it up somewhere else. I think  
2 this is more than a middleman is no longer in the middle. So  
3 the communications might just be going directly. It might use  
4 some other middleman. But we are providing the services on the  
5 Internet in a different way, and expanding the TRO to other  
6 service providers like CloudFlare is an expansion of the kind  
7 of attempts that plaintiffs, like the plaintiffs here, have  
8 made to prevent infringers, and that raises difficult issues  
9 and important issues that we want to address with the Court.

10           I suppose there are two points that I am making. One  
11 is we provide a different service than is typically the kind of  
12 service that gets enjoined, or the kind of entity that gets  
13 enjoined in these matters, and that we think is a reason why we  
14 can't be enjoined.

15           THE COURT: How long has CloudFlare been around?

16           MR. HARRINGTON: I am not sure how many years  
17 CloudFlare has been around.

18           THE COURT: Do you know if they have ever been  
19 enjoined related to copyright infringement?

20           MR. HARRINGTON: It's my understanding, and we can  
21 confirm this, in the past, when these issues have come up and  
22 CloudFlare counsel has explained them, there wasn't  
23 follow-through. Basically, the parties accepted CloudFlare's  
24 explanations and sought other avenues for remedy. But I have  
25 not represented CloudFlare previously in these kinds of

F5Q8ARIC

1 matters.

2 THE COURT: You're not contesting any of the  
3 underlying matters with respect to whether there is an  
4 infringement of any kind going on here. It's simply the nature  
5 of the service you provide, if I am understanding your  
6 contention, is sort of a middleman passivity that you  
7 believe -- well, go ahead.

8 MR. HARRINGTON: That's correct. We are not here to  
9 defend the defendants. We are here to say that the service  
10 that CloudFlare provides sits at a different point in the  
11 Internet infrastructure, and enjoining entities like CloudFlare  
12 is a novel step and one that we think raises important issues  
13 that need to be fully briefed and explored by the Court before  
14 the Court takes any actions. It's our view now that CloudFlare  
15 is not properly enjoined in connection with the activities of  
16 these defendants because of the kind of service that it  
17 provides.

18 It's the argument that we briefly sketch out in our  
19 letter, which is that plaintiffs are treating the TRO as  
20 something that can effectively enjoin the world. Anyone who  
21 touches upon the matters, no matter how passively, could be  
22 enjoined. Because if you remove them, it makes it a little  
23 harder or maybe delays what the defendants are doing.

24 THE COURT: Go ahead.

25 MR. DOROSHOW: A few comments in response to that.

F5Q8ARIC

1           Again, they may have some disagreement about the  
2       nature and extent of the service that they do provide, but at a  
3       baseline there is no disagreement. CloudFlare is providing a  
4       service, a benefit to these defendants, or else why would  
5       defendants subscribe to this service?

6           THE COURT: That can't be the limit of what is  
7       enjoined. They might rent an office space. They might be  
8       serviced in all kinds of ways that don't bring it within the  
9       scope of the injunction. They provide a service, but the  
10      question is, are they within the scope of the injunction.

11           In essence, there are two questions. I am not sure if  
12      it's any different. Well, if it will be different down the  
13      road versus different now, there is a question of whether they  
14      are bound by the existing TRO, and, therefore, assuming you  
15      prevail through default or otherwise on the permanent  
16      injunction, will they be bound.

17           Then I suppose there is a separate question of  
18      whether -- that's the question. That's the question.

19           MR. DOROSHOW: Right. Although, your Honor, the  
20      difference here is, setting aside whether they were bound by  
21      the TRO as it issued on the 13th, they are now with complete  
22      knowledge of the TRO and its existence, our claims, the nature  
23      of this Web site. It is, by its very existence, infringing.  
24      Its express purpose is to infringe. CloudFlare is fully on  
25      notice of all of this. At that point, the continuation of

F5Q8ARIC

1 providing services to this blatant infringer is aiding and  
2 abetting that infringement. It allows that service to continue  
3 on the grooveshark.li domain. It optimizes the service for the  
4 benefit of the users who use the Web site to infringe. And  
5 CloudFlare now, doing that with knowledge, is aiding and  
6 abetting.

7 We had cited to your Honor a decision from Judge  
8 Hellerstein in the North Face v. Fujian case where he found,  
9 not someone as closely connected to the defendants as  
10 CloudFlare is, but rather the operator of the registry that  
11 administers the dot org domain, which is a company called  
12 Public Interest Registry, which is in Virginia. And Judge  
13 Hellerstein concluded, properly so, that once Public Interest  
14 Registry was on notice of the court's order, its continuing  
15 provision of even that detached service of allowing the domain  
16 name to exist in the registry was aiding and abetting, and the  
17 Public Interest Registry was ordered forthwith to cease and  
18 desist from that.

19 Here, CloudFlare is much more directly connected to  
20 the defendants than the Public Interest Registry, which had no  
21 contractual relationship with the Web site; they simply  
22 administered the top-level domain more generally. Here,  
23 CloudFlare has a customer. It is the defendants. The  
24 defendants had a contractual relationship with CloudFlare.  
25 There is a very specific and targeted relationship. So for

F5Q8ARIC

1 CloudFlare to continue that relationship with knowledge of all  
2 of this -- our TRO, our claims, the likelihood of success that  
3 we have already established, and the irreparable harm that we  
4 continue to suffer every single day -- we submit, your Honor,  
5 that's aiding and abetting, and therefore fully within the  
6 scope of a TRO.

7 THE COURT: Mr. Harrington, I will give you a chance  
8 in one moment, but Mr. Doroshow, are you aware of CloudFlare  
9 having previously been enjoined?

10 MR. DOROSHOW: Yes, your Honor, at least in one  
11 decision. There may be countless others that we haven't seen,  
12 but there is a decision, a Westlaw decision. I can read into  
13 the record the citation for you. The case is called DISH  
14 Network LLC v. Dillion. The Westlaw citation is 2012 WL  
15 368214, and that was a decision of the Southern District of  
16 California, February 3, 2012.

17 THE COURT: That specifically enjoined CloudFlare or  
18 it was deemed a comparable order, like the one issued by Judge  
19 Batts here was deemed to apply to CloudFlare?

20 MR. DOROSHOW: It specifically names CloudFlare, and  
21 it enjoins them in their capacity as a Web site optimization  
22 company, which is precisely what they are performing here.

23 THE COURT: This is just a procedural question. If  
24 you were to bring a separate action naming CloudFlare and seek  
25 a TRO with respect to them here, you think that's the same

F5Q8ARIC

1 question as to whether the existing TRO applies in light of  
2 their notice now or what?

3 MR. DOROSHOW: Not necessarily, your Honor, and we are  
4 reserving on the question of whether to name CloudFlare as a  
5 party. But in terms of the scope of their knowing contribution  
6 to this Web site, it certainly meets the standard of what is  
7 enjoinsable under Rule 65. Standing here today I don't want to  
8 equate the standard for Rule 65, the scope of permissible  
9 injunctions under Rule 65 as a liability standard. I don't  
10 know if they are coextensive. I don't think they need to be.  
11 But even if they were, I would submit that CloudFlare meets  
12 even that heightened standard given their knowledge and the  
13 nature of the service that they provide.

14 THE COURT: Mr. Harrington, do you want to make a  
15 point? I will hear that point and then I am just going to ask  
16 each of you -- what I hear at base, Mr. Harrington's request is  
17 to give them a few days to put in a broader opposition paper.  
18 I will hear plaintiff on their view of that. Then I will also  
19 just sort of hear generally your proposal on how to proceed  
20 beyond that.

21 Mr. Harrington, you wanted to respond to something.

22 MR. HARRINGTON: Yes. I just briefly wanted to state  
23 that the test for an injunction is whether CloudFlare is in  
24 active concert or participation with the defendants, and it's  
25 our contention that the kind of service that we are providing

F5Q8ARIC

1       is one that doesn't meet that test. But ultimately all we are  
2       asking for here today is to give us the time that we request,  
3       until Monday, a week from today, to provide additional briefing  
4       and to give your Honor enough context to hopefully appreciate  
5       our point, which is that the issues are not as simple as they  
6       might seem in plaintiffs' papers. We understand plaintiffs are  
7       eager to pull in any third parties that might help them end  
8       what they are trying to stop, but it's our view that CloudFlare  
9       is not the kind of third party that should be brought into this  
10      sort of dispute between plaintiffs and the defendants in the  
11      action, and there are important legal principles at stake that  
12      we would like to fully brief.

13                  THE COURT: You're asking until when?

14                  MR. HARRINGTON: Until Monday, June 1.

15                  THE COURT: Until June 1.

16                  Are you willing to consent to a TRO until that time?

17                  MR. HARRINGTON: My client's position is that as a  
18      kind of neutral service provider on the Internet, its  
19      relationship with its clients, not these defendants in  
20      particular but all of its clients, is very important, and the  
21      fact that they will go through legal process to protect both  
22      CloudFlare's rights and whatever rights their customers might  
23      have not to have CloudFlare brought into their action is  
24      important.

25                  If this were an injunction matter involving an effort

F5Q8ARIC

1 by a landlord to get someone out of a house and the water  
2 company came in because there is an injunction to try and stop  
3 servicing water to the house, the water company wouldn't  
4 consent to a TRO because they have important legal principles  
5 they need to defend. It's our position here that we need to do  
6 that as well. We need to fully brief and litigate the issues  
7 because we don't think it is appropriate that the type of  
8 service that we provide on the Internet is one that is subject  
9 to an injunction in a private dispute between parties over  
10 infringement.

11 THE COURT: Mr. Doroshow.

12 MR. DOROSHOW: Your Honor, a couple of things there.

13 We obviously are seeking immediate relief here. A TRO  
14 is important to us for all the reasons we said at the beginning  
15 of this case back on May 12. To delay the briefing until June  
16 1, and perhaps a hearing after that, also would put us on a  
17 totally separate track than we are already on with respect to  
18 the defendants. As your Honor noted earlier, the defendants  
19 are ordered to file any response papers on May 29, this week,  
20 and the hearing is then June 3. So we will be on a staggered  
21 track which complicates matters for us.

22 More fundamentally, in the meantime we continue to  
23 suffer irreparable harm on a growing basis. The site continues  
24 to grow in popularity. CloudFlare continues to provide its  
25 name server resolution service. It's how people are connected

F5Q8ARIC

1 to the site. In addition to these other services, CloudFlare  
2 routes all traffic -- other than the download of individual  
3 sound files, all traffic to and from that Web site is routed  
4 through CloudFlare to this Web site. CloudFlare is an integral  
5 part of this service, and to allow it to continue to provide  
6 that service, even as we litigate these issues, which we submit  
7 are not nearly so difficult as CloudFlare suggests they are, we  
8 would continue to suffer irreparable harm.

9 THE COURT: You learned from CloudFlare on May 14 that  
10 they saw themselves as not needing to comply, right?

11 MR. DOROSHOW: On May 14 is when we made contact. May  
12 15 we had a telephone conversation.

13 THE COURT: In any event, you took a week between then  
14 and when you came to court seeking orders from me.

15 MR. DOROSHOW: Yes. And there is a reason why we took  
16 that interim step. When we notified CloudFlare, the site had  
17 moved from grooveshark.io to grooveshark.vc. Only over the  
18 weekend was there a subsequent move from grooveshark.vc to  
19 grooveshark.li. That happened on Sunday, the 17th I believe.

20 At that point, this past week, only then did we  
21 realize CloudFlare not only had no intention of complying with  
22 the order, but that they would continue to supply name server  
23 resolution to yet another site, because there was another  
24 configuration of another name server after we had already  
25 spoken to CloudFlare. So that grooveshark.li site would

F5Q8ARIC

1 resolve through CloudFlare's name server to an IP address.

2 So, essentially, on Monday of that week we realized,  
3 OK, there is now a Web site that is being administered overseas  
4 in Switzerland. And now we know that CloudFlare is going to  
5 continue to provide name server resolution, notwithstanding the  
6 notice we have given them, that's when we took action. And in  
7 order to prepare these papers, it took us a couple of days to  
8 get them before your Honor.

9 THE COURT: OK. In any event, you had about a week.

10 I am just thinking through the schedule. I am not  
11 sure what to do about the lack of a parallel track with the  
12 underlying action. It seems as if no one is coming in that in  
13 any event.

14 There's two ways to proceed. I suppose there's three  
15 ways to proceed. I can decide on what is in front of me, but  
16 given that CloudFlare is here and they were only served these  
17 papers on Friday -- is that right?

18 MR. HARRINGTON: Yes.

19 THE COURT: -- I am going to give them a few days to  
20 put in some briefing.

21 So, one possibility is I give them a couple of days to  
22 put in some briefing while I am looking at the issue, and I  
23 will get something out as quickly as I can, but after giving  
24 them a chance to put something fuller in. I am not talking  
25 about June 1. I am talking a few days after today.

F5Q8ARIC

1                   MR. DOROSHOW: If I may, one point on that. The other  
2 factor to consider as well in the TRO context is, of course,  
3 the balance of harm. In our view, we see zero harm to  
4 CloudFlare if they were enjoined in the interim period, from  
5 today going forward, whereas the harm to us is obvious.

6                   CloudFlare talks about their position with respect to  
7 other customers; they service other legitimate Web sites and so  
8 on. We are not talking about those Web sites. We are talking  
9 about a single Web site that is inarguably violating the law  
10 openly. And for them to be able to continue to provide service  
11 to that particular Web site, while we wait for briefing to  
12 occur, again, we just don't see how the balance of harm could  
13 be weighed in any way other than decidedly in plaintiffs'  
14 favor.

15                  THE COURT: That might well be true, but it's a bit  
16 the cart before the horse. There just is not a basis to  
17 proceed without giving them an opportunity to be heard, which  
18 they are plainly being given. As I said, I am talking about a  
19 few days.

20                  I do think CloudFlare has a choice to make. We can do  
21 this in a very quick posture, which means you're going to have  
22 to put something in -- in my head it's a question of whether  
23 it's two days I think at most -- and then I am going to decide  
24 it very quickly. Maybe that's fine for you. Then maybe we  
25 come back 14 days later and we have a full-blown PI hearing,

F5Q8ARIC

1 but there will already be a decision on the books making an  
2 assessment of likelihood of success on the merits. Or you  
3 consent to a TRO until we have an opportunity for full  
4 briefing, a factual hearing, if that's what we are talking  
5 about, and we do this in a much more deliberate mode. And I  
6 don't see, frankly, why your customers wouldn't perceive that  
7 as fighting just as hard for the principle as something else.  
8 I think that's the choice.

9 MR. HARRINGTON: I did discuss this with the client.  
10 If I could propose perhaps a short break just to speak to my  
11 client about it, but I am at this point fairly confident,  
12 unless having listened to the argument they have a different  
13 view, that their view would be they prefer to work harder and  
14 brief the issue faster, and also perhaps without the benefit of  
15 the two weeks and full hearing without a TRO. But if the Court  
16 would give me the chance, I will reach out and talk to them.

17 THE COURT: I will adjourn for a moment and come back.  
18 I do think that's what we face. I think the irreparable harm  
19 argument that was just raised, I didn't hear you articulate, at  
20 least here, what that would be. There is already, obviously, a  
21 determination that's been made of irreparable harm and  
22 likelihood of success on the infringement and the like. I hear  
23 you that there is a legal issue that needs to be resolved.

24 So the TRO is going to be one posture. A more full  
25 record might be another. I will do one of the two. You let me

F5Q8ARIC

1 know. And whichever it is, once you talk to your client, come  
2 back and confer with opposing counsel, and whether it's door  
3 number one or door number two, what the proposal is for timing,  
4 and I will come back in about five minutes.

5 Thank you.

6 (Recess)

7 THE COURT: Mr. Harrington.

8 MR. HARRINGTON: I did consult with my client, and as  
9 I predicted, I think our preference is to have an expedited  
10 briefing and hearing schedule rather than consent to a TRO. I  
11 have discussed it with plaintiffs, and we were thinking of  
12 proposing a Monday hearing, if that works for your Honor, with  
13 briefing prior to that. So a brief by us and a reply brief by  
14 plaintiffs. We haven't yet settled on dates and times for  
15 those briefs.

16 THE COURT: All right. What do we think we need to do  
17 at the hearing?

18 MR. HARRINGTON: I think from our perspective we would  
19 probably need to call at least one witness who can describe for  
20 your Honor what CloudFlare's system is and how it fits into the  
21 broader context and answer whatever questions your Honor has  
22 about that.

23 THE COURT: What do you think, Mr. Doroshow?

24 MR. DOROSHOW: Your Honor, it is quite complicated.  
25 If we are going to have expert witnesses, we will need our own,

F5Q8ARIC

1 and this becomes more of a full-blown factual investigation,  
2 and all the while, as I have said, we continue to be  
3 irreparably harmed.

4 We are trying to be as accommodating as we can, but we  
5 are in a very difficult spot here. We feel like we need and  
6 are entitled to immediate relief, and if we are going to have  
7 to allow the process to go forward with competing experts on  
8 factual issues, it really puts us in a difficult spot.

9 THE COURT: That's true, but I can't just take what  
10 you say as a factual assertion and assume it to be true if  
11 there are contested facts.

12 Here is what I think. I don't think it makes sense to  
13 do an actual full-blown hearing and then two weeks later do it  
14 again. It just doesn't make any sense. So my suggestion would  
15 be, I am going to let them put in papers, including their  
16 factual declarations, which can compete with yours. I don't  
17 think there are credibility issues to be made out, at least for  
18 purposes of a TRO. If they say something factually different  
19 about their technology than what you say, I am going to have to  
20 sort out what matters with that for purposes of the TRO.

21 If what they are saying is things you're saying and  
22 the relief you're seeking is contingent on facts which aren't  
23 true, I can't just, because you're saying you're going to be  
24 irreparably harmed, go ahead and grant it, but maybe these  
25 facts don't matter. I don't think it makes sense to do what it

F5Q8ARIC

1 sounds like might be required for the preliminary injunction  
2 stage at the TRO stage.

3 I think everybody is shaking their heads in agreement.  
4 So I will hear you, but my proposal would be to give CloudFlare  
5 two days to put in opposition papers, and then I will decide  
6 the TRO. Then if anyone really thinks we need a full-blown  
7 hearing on a PI after that, I will bring you in quickly after I  
8 issue my order and we can figure out what needs to happen next.

9 MR. HARRINGTON: We can prepare papers like that.

10 What I would just mention is in the event the Court  
11 feels that having read the papers it would be helpful to hear  
12 from someone at CloudFlare who is an expert, in a sense, that's  
13 something that we are obviously amenable to.

14 THE COURT: It's their burden. It's the plaintiffs'  
15 burden to prove what they need to prove to show that you're  
16 implicated in the existing TRO. You want to do that  
17 immediately. They want immediate relief, obviously, and they  
18 may well be entitled to it. I am giving you a chance to be  
19 heard. I hear you. So you agree to that, Mr. Harrington, and  
20 you're offering it if I have questions.

21 Mr. Doroshow.

22 MR. DOROSHOW: Just to clarify, once we receive the  
23 papers that they are going to submit in two days, if we feel a  
24 need to reply, will we have an opportunity to do so, inform the  
25 Court of our intention to reply?

F5Q8ARIC

1           THE COURT: You would get a reply. In the meantime I  
2 am going to decide it. I am going to move as quickly as I can  
3 given your indication of the need for relief. But if you would  
4 like a day to reply, that's fine.

5           MR. DOROSHOW: Thank you, your Honor.

6           THE COURT: And you agree, Mr. Doroshow, we will do  
7 this on the papers, and hopefully we will reach the point of  
8 resolution, but if we need to do it again in a preliminary  
9 injunction context, permanent injunction context, we can come  
10 in quickly and figure out what needs to be done.

11          MR. DOROSHOW: Yes, your Honor.

12          THE COURT: So today is May 26. CloudFlare's papers  
13 on or before May 28. I am actually going to say 3 p.m. Then  
14 any reply, if it's coming in, by 10 a.m. on the 29th.

15          MR. HARRINGTON: Because my co-counsel is in the West  
16 Coast, if 3 p.m. is what the Court wants, we will do that, but  
17 if it's possible to have it a little later in the day, that  
18 just might be easier for them to work through the time change  
19 issues.

20          THE COURT: I will do 5 p.m. Then I will give the  
21 reply by noon on the 29th.

22          MR. HARRINGTON: Can I just ask you one other question  
23 about the unsealing order?

24          The order that is on the docket says the case is  
25 unsealed. My understanding of that is it means the underlying

F5Q8ARIC

1 documents, the original application and the order, are  
2 therefore unsealed. But there was a concern that maybe certain  
3 documents were still under seal even though the case had been  
4 unsealed. The reason why we e-mailed the letter to the Court  
5 rather than filing it is because we weren't entirely sure.

6 THE COURT: I don't believe anything is sealed at this  
7 point.

8 MR. DOROSHOW: That's correct from our perspective.

9 THE COURT: No one sees a reason for sealing at this  
10 point, correct?

11 MR. DOROSHOW: That's correct.

12 THE COURT: Nothing is sealed. It may be that there  
13 is a lag in documents getting up on ECF, coming out of the  
14 sealing envelopes and getting onto ECF, but everything can  
15 happen on ECF now and should happen on ECF.

16 MR. HARRINGTON: In the event there are parts of the  
17 factual submission that are sensitive, should we just follow  
18 the Court's individual rules on how to deal with that?

19 THE COURT: You should. And just know sensitivity is  
20 not the standard. I know that was shorthand, but I am a  
21 stickler and will look for justification under the Second  
22 Circuit's standard for doing anything under seal.

23 MR. HARRINGTON: Thank you, Judge.

24 THE COURT: So we have our basic schedule. I am going  
25 to encourage you to talk again and just think about whether you

F5Q8ARIC

1 want to continue in this very expedited posture and think about  
2 a slight delay if folks think they need more time. This is the  
3 schedule, so unless anything changes this is when I will get  
4 the papers and I will put out an order very, very quickly, and  
5 then we will come back if we need to. But I want to try to  
6 encourage you to think about what is overall most efficient in  
7 this process. So just reflect on whether you want to keep on  
8 this path or do something different from what you think you  
9 need to make out your case. But I have a request to move  
10 quickly given the allegations of harm so I will.

11 Anything else I need to address at this time?

12 MR. HARRINGTON: Nothing, your Honor.

13 MR. DOROSHOW: Nothing, your Honor.

14 THE COURT: Thank you. We are adjourned.

15 (Adjourned)

16

17

18

19

20

21

22

23

24

25